Code Brilliant Sdn Bhd (in liquidation) & Ors v Heng Ji Keng & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D-24NCC-53 OF 2011
AZIZAH NAWAWI JC
17 DECEMBER 2012

Civil Procedure — Interlocutory order — Cross-examination of parties — Issues of locus standi, debenture and money lending agreement raised in affidavits — Cross examination of deponents of affidavits — Whether issues could be raised at interlocutory stage for purposes of substantive application — Whether res judicata — Whether cross-examination barred — Rules of Court 2012 O 28 r 4 & O 34 r 2

The second plaintiff was the receiver of the first plaintiff, a wholly-owned subsidiary of Eramara Jaya Sdn Bhd ('the fifth defendant). The second plaintiff was duly appointed by the third plaintiff under a debenture. The third plaintiff was said to be a creditor of the first plaintiff while the first and second defendants were liquidators of the fifth defendant, appointed by the court. It was also alleged that they were liquidators of the first defendant pursuant to a creditors' voluntary liquidation, the very issue disputed by the plaintiffs in the present action. In the originating summons ('OS'), the plaintiffs sought for the disqualification and removal of the first and second defendant as the liquidators of the first plaintiff. In the interim, the plaintiffs filed an application for an interlocutory injunction ('encl 4'), which was granted by the court, restraining the first and second defendants from acting for the first plaintiff in any capacity until the disposal of the inter parte application. The first and second defendants then filed an application ('encl 9') to set aside the ex parte order and the application was allowed and encl 9 was subsequently dismissed and as such, the first and the second defendants were injuncted from acting for the first plaintiff until the disposal of the originating summons ('OS'). The first and second defendants applied to convert the OS into a writ action ('encl 50'), as the plaintiffs had alleged fraud or unlawful maneuvering by the first and second defendants. However, the court did not convert the OS into a writ action, but instead ordered that: the allegations of fraud or unlawful maneuvering were expunged from the affidavits; and the plaintiffs would proceed with the OS on all other aspects. On the issue of the appointments of the first and second defendants which were said to contravene the law; leave was granted to counsel for the first and second defendants to cross-examine the deponents of affidavits filed for and on behalf of the plaintiffs; leave was granted to counsel for the plaintiffs to cross examine the deponents of affidavits filed for and on behalf of the first and second defendants; and no cross-examination of deponents of affidavits for the fourth defendant without leave of the court. With the

exchange of the affidavits for the purpose of the substantive hearing of the OS, the plaintiffs took offence to the issues of the locus standi, the debenture and a money lending agreement ('MLA') which were raised in the affidavits of the first and second defendants. Hence, the plaintiff filed the present application under O 28 r 4 and O 34 r 2 of the Rules of Court 2012 to bar the cross examination on the said issues. The main issue in this application was whether the issues of locus, the debenture and the MLA was res judicata and could not be raised during the cross examination of the affidavits filed in court.

Held, dismissing the application:

(1) The issues raised during interlocutory stage for injunctive reliefs are not res judicata for the purpose of the substantive application as they are not final in nature which decides on the rights of the parties. At the interlocutory stage for injunctive reliefs, the court is only to decide whether issues discloses a bona fide serious issue to be tried and it is not a trial on merits and that the courts were not deciding on the rights of the parties (see para 27).

(2) The issues of locus standi, the debenture and the MLA, which have been argued extensively during the interlocutory stage were not res judicata and could be raised during the cross examination for the purposes of the substantive application. Having decided the issue of locus by other courts, this issue was taken as a preliminary objection. As the matter was raised as a preliminary issue, the same did not bar the issue of locus from being raised in this main application, through the cross examination of the affidavits (see paras 28–29).

[Bahasa Malaysia summary

Plaintif kedua merupakan penerima plaintif pertama, subsidiari milikan penuh Eramara Jaya Sdn Bhd ('defendan kelima'). Plaintif kedua telah dilantik oleh plaintif ketiga di bawah debentur. Plaintif ketiga dikatakan merupakan pemiutang plaintif pertama manakala defendan pertama dan kedua merupakan likuidator-likuidator defendan kelima, yang dilantik oleh mahkamah. Adalah juga didakwa bahawa mereka merupakan likuidator-likuidator defendan pertama menurut likuidasi sukarela pemiutang-pemiutang, isu yang dipertikaikan oleh plaintif-plaintif dalam tindakan ini. Di dalam saman pemula ('SP'), plaintif-plaintif memohon untuk pembatalan defendan pertama dan kedua sebagai likuidator-likuidator plaintif pertama. Dalam interim, plaintif-plaintif memfailkan permohonan untuk injunksi interlokutori ('lampiran 4'), yang mana telah diberikan oleh mahkamah, menghalang defendan pertama dan kedua untuk bertindak untuk plaintif pertama dalam sebarang kapasiti sehingga pelupusan permohonan inter parte. Defendan pertama dan kedua kemudian telah memfailkan permohonan ('lampiran 9') untuk mengetepikan perintah ex parte dan permohonan tersebut telah dibenarkan dan lampiran 9 kemudiannya telah

ditolak dan oleh itu, defendan pertama dan kedua telah diinjunksi daripada bertindak untuk plaintif pertama sehingga pembatalan saman pemula ('SP'). Defendan pertama dan kedua memohon untuk menukarkan SP kepada tindakan writ ('lampiran 50'), memandangkan plaintif-plaintif telah mendakwa fraud atau pengendalian yang salah di sisi undang-undang oleh defendan pertama dan kedua. Walau bagaimanapun, mahkamah tidak menukarkan SP kepada tindakan writ, tetapi sebaliknya memerintahkan bahawa: dakwaan-dakwaan fraud atau pengendalian tidak sah dipadamkan daripada afidavit-afidavit; dan plaintif-plaintif hendaklah meneruskan dengan SP daripada semua aspek. Mengenai isu pelantikan defendan pertama dan kedua yang mana dikatakan bercanggah dengan undang-undang; kebenaran telah diberikan kepada peguam untuk defendan pertama dan kedua untuk menyoal balas saksi sumpah afidavit-afidavit yang difailkan untuk dan bagi pihak plaintif-plaintif; kebenaran telah diberikan kepada peguam untuk plaintif-plaintif untuk menyoal balas saksi sumpah afidavit yang telah difailkan untuk dan bagi pihak defendan pertama dan kedua; dan tiada soal balas saksi sumpah afidavit-afidavit untuk defendan keempat tanpa kebenaran mahkamah. Dengan penukaran afidavit-afidavit untuk tujuan perbicaraan substantif SP, plaintif-plaintif 'took offence' terhadap isu locus standi, debentur dan perjanjian pinjaman kewangan '(PPK') yang mana telah dibangkitkan di dalam afidavit-afidavit defendan pertama dan kedua. Justeru, plaintif telah memfailkan permohonan ini di bawah A 28 k 4 dan A 34 k 2 Kaedah-Kaedah Mahkamah 2012 untuk menghalang soal balas tentang isu-isu tersebut. Isu utama di dalam permohonan ini adalah sama ada isu-isu locus, debentur dan PPK adalah res judicata dan tidak boleh dibangkitkan semasa soal balas afidavit-afidavit yang difailkan di dalam mahkamah.

Diputuskan, menolak permohonan:

(1) Isu-isu yang dibangkitkan semasa peringkat interlokutori untuk relief-relief injunktif bukanlah res judicata bagi tujuan permohonan substantif memandangkan ianya bukanlah bersifat muktamad yang mana menentukan hak pihak-pihak. Semasa peringkat interlokutori untuk relief-relief injunktif, mahkamah hanyalah perlu memutuskan sama ada isu-isu mengemukakan isu bona fide yang serius untuk dibicarakan dan ia bukanlah perbicaraan atas merit dan bahawa mahakmah tidak seharusnya membuat keputusan tentang hak pihak-pihak (lihat perenggan 27).

(2) Isu locus standi, debentur dan PPK, yang mana telah dipertikaikan secara meluas semasa peringkat interlokutori bukanlah res judicata dan boleh dibangkitkan semasa soal balas untuk tujuan permohonan substantif. Setelah memutuskan isu locus oleh mahkamah-mahkamah lain, isu ini diangggap sebagai bantahan awalan. Memandangkan perkara ini telah dibangkitkan sebagai isu awalan, ianya tidak menghalang isu locus

daripada dibangkitkan di dalam permohonan utama, melalui soal balas afidavit-afidavit (lihat perenggan 28–29).]

Notes

For a case on cross-examination of parties, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 4280.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90, HC (refd)

Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor [2008] 4 MLJ 701, CA (refd)

Florence Bailes v Dr Ng Jit Leong [1983] 2 MLJ 175 (refd)

Perumahan Farlim (PG) Sdn Bhd & Ors v Cheng Hang Guan & Ors [1989] 3 MLJ 223, SC (refd)

Tetuan J & S Holdings Sdn Bhd v A Karim bin Hassan [2000] 6 MLJ 739, HC (refd)

Wong Lok Khiam v Dato Peter Lo Su Yin & Ors (No 3) [1972] 1 MLJ 176 (refd)

Legislation referred to

Companies Act 1965
Rules of Court 2012 O 28 r 4, O 34 r 2

AI Nathan (Hasnal Rezua and Lim with him) (AI Nathan) for the plaintiffs.
Malik Imtiaz (Emily Goh and Nazifah with him) (Lim Soh & Goonting) for the first and second defendants.

Azizah Nawawi JC:

APPLICATION

[1] Enclosure (124) is an application by the plaintiffs under O 28 r 4 and O 34 r 2 of the Rules of Court 2012. This application is to limit the cross-examination of the affidavits deposed by the plaintiffs and the first and second defendants pursuant to an order made by the court on 18 January 2012.

[2] The application is to limit the issues for cross-examination, amongst others, to the notice of the creditors meeting, the legality of the appointment of the first and second defendants under the Companies Act 1965 and the first and second defendants position of conflict where they, as liquidators of Eramara Jaya Sdn Bhd ('D5') purportedly appoint themselves as liquidators of the first plaintiff.

[3] What is more crucial however is that this application also seeks bar the cross-examination of the following issues:

(a) the locus standi of the first and third plaintiff to bring this action (the 'locus' issue);

(b) the legality of the debenture dated 1 July 2008 (the 'debenture' issue); and

(c) the legality of the money lending agreement dated 4 December 2003 (the 'MLA' issue).

THE SALIENT FACTS

[4] The second plaintiff is the receiver of the first plaintiff, a wholly owned subsidiary of Eramara Jaya Sdn Bhd, the fifth defendant. The second plaintiff was duly appointed by the third plaintiff under a debenture dated 1 July 2008. The third plaintiff is said to be a creditor of the first plaintiff.

[5] Both the first and second defendants are court appointed liquidator of Eramara Jaya Sdn Bhd, the fifth defendant vide court order dated 8 July 2005. The first and second defendants also say that they had also been appointed as the liquidator of the first defendant pursuant to a creditors' voluntary liquidation on 24 January 2011, the very issue disputed by the plaintiffs in this action.

[6] In the originating summons, the main relief sought by the plaintiffs is the disqualification and the removal of the first and second defendant as the liquidators of the first plaintiff.

[7] In the interim, the plaintiffs have filed an *application for an interlocutory injunction* (encl 4), which was granted by the court on 18 March 2011, which restrains the first and second defendants from acting for the first plaintiff in any capacity until the disposal of the inter parte application.

[8] The first and second defendants then filed an application (encl 9) *to set aside the ex parte order*.

[9] On 2 November 2011, the court allowed encl (4) and dismissed encl (9). As such, the first and the second defendants have been injuncted from acting for the first plaintiff in any capacity until the disposal of the OS.

[10] Vide a summons in chambers dated 18 November 2011 (encl 50), the

first and second defendants applied to convert the OS into a writ action, as the plaintiffs had alleged fraud or unlawful manoeuvring by the first and second defendants.

[11] During the hearing of encl (50) on 18 January 2012, the court did not convert the OS into a writ action, but instead made the following orders:

(a) allegations of fraud or unlawful manoeuvring are expunged from the affidavits;

(b) the plaintiffs will proceed with the OS on all other aspects and on the issue of the appointments of the first and second defendants which are said to contravene the law;

(c) leave is granted to counsel for the first and second defendants to cross-examine the deponents of affidavits filed for and on behalf of the plaintiffs;

(d) leave is granted to counsel for the plaintiffs to cross-examine the deponents of affidavits filed for and on behalf of the first and second defendants; and

(e) no cross-examination of deponents of affidavits for the fourth defendant without leave of the court.

[12] With the exchange of the affidavits for the purpose of the substantive hearing of the OS, the plaintiffs took offence to the issues of the locus standi, the debenture and the MLA being raised in the affidavits of the first and second defendants. Hence this application by the plaintiff is to bar the cross-examination on the said issues.

SUBMISSION OF PARTIES

[13] The plaintiffs submit that the issues for cross-examination, which are their causes of action in the originating summons are:

(a) the validity of the appointment of the first and second defendants for the first plaintiff;

(b) non-compliance with the Act 125; and

(c) the position of conflict of the appointment of the first defendant and the second defendant, as they are liquidator of the fifth defendant.

[14] It is the submission of the plaintiffs that the three issues of locus, the debenture and the MLA have already been determined by this court in the hearing of encls (4) and (9), apart from two other courts (only on the issue of locus in D7–28–650 of 2000 and W-02(IM)-1698 of 2010). All these issues

have been ventilated in great detail on 2 November 2011. The court ruled to dismiss encl (9) and allowed encl (4). There are no appeals on both encls (4) and (9). The plaintiffs submit that these issues are already spent and are caught by the res judicata principle.

[15] However, both the second and third defendants submit that encls (4) and (9) did not deal with the final determination of the issues. The issues are still at large, and the issue of locus can be taken at both threshold and substantive. Since cross-examination is on the substantive issues of the OS, the issues can still be raised at the substantive stage.

[16] The defendants also submit that the parties have consented to encl (50), and the terms of encl (50) did not oust the three contentious issues. The plaintiffs could have applied for the issue of locus to be incorporated in the consent order, but in reality it was not incorporated in consent order. As such, the defendants submit that this must be held against the plaintiffs. The defendants say that if this court is to agree with the plaintiffs' submission, the effect is to vary the consent order, and this court has no jurisdiction to do so.

THE ISSUE

[17] The issue in this application is whether the issues of locus, the debenture and the MLA is res judicata and cannot be raised during the cross-examination of the affidavits filed in court for the purposes of the substantive hearing, as the same had been raised and argued extensively in the interlocutory stage (for injunction) and in other cases (only on the issue of locus).

THE FINDINGS OF THE COURT

[18] It is not in dispute that the issues of locus, the debenture and the MLA have been raised by the parties during the hearing of encl (4), the application for inter parte interlocutory injunction and encl (9), the application to set aside the interlocutory injunction granted ex parte.

[19] However, it must be borne in mind that both encls (4) and (9) are matters pertaining to the granting to an interlocutory injunction. On the status of an interlocutory injunction, the Supreme court in *Perumahan Farlim (PG) Sdn Bhd & Ors v Cheng Hang Guan & Ors* [1989] 3 MLJ 223 said this:

> The object of an interlocutory interim injunction is to preserve matters in status quo until the case be tried. Such an injunction is therefore usually so framed as to continue in force until the hearing of the cause or until further order. It cannot be considered in argument as affecting the ultimate decision of a cause. In *Gilbert v Endean* (1878) 9 Ch D 259 at pp 268–9, the matter was clearly stated by Cotton LJ at p 268:

> … those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.

[20] This position has been reaffirmed by the Federal Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 where Jemuri Serjan CJ (Borneo) held at p 266:

> At an interlocutory proceeding for an injunction, the court is not called upon nor is it desirable for the court to decide finally on the rights of the parties but the court must be satisfied that there is a serious issue to be tried. The court is not justified in embarking on anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either part's case …

[21] Therefore, since the issues raised in the interlocutory applications do not decide the rights of parties, but are made for the purpose of keeping things in status quo till the rights can be decided, the issue then is whether the issues raised during the interlocutory application can be considered as res judicata and the same cannot be raised for the purposes of the substantive hearing.

[22] In *Wong Lok Khiam v Dato Peter Lo Su Yin & Ors (No 3)* [1972] 1 MLJ 176, the issue of res judicata was raised, in that whether the issue of locus standi, which was raised during the application of the interim injunction can be raised during the substantive hearing. Justice Lee Hun Hoe held as follow:

> Mr Loo, for the plaintiff, stressed that all points before the court was raised at the hearing on the motion to discharge the interim injunction. He submitted that the defendants should not have raised the same points on the ground of res judicata. He cited various authorities to show that since the questions have been raised and argued on previous occasions they should not be raised again.
>
> I am unable to agree with Mr Loo that res judicata applies. The points now raised were also raised in the support of the application for the discharge of the interim injunction. BTH Lee made clear that the sole question before him was the interim injunction and any issue to be tried must be by evidence at the trial.

[23] In *Florence Bailes v Dr Ng Jit Leong* [1983] 2 MLJ 175, a preliminary objection was raised before Justice Ajaib Singh, that the issues in the substantive hearing should not be heard on the principle of res judicata and *functus officio*. The issues are said to be res judicata as the court had dealt with them in the application for an interim injunction and made findings which appear to cover all issues involved in the suit. In dismissing the preliminary objection, His Lordship said this:

> I think it may not be an unreasonable inference to draw from *all the facts and circumstances leading to the interim injunction and subsequently to the order vacating the interim injunction that the parties had confined themselves to the issue only of the interim injunction and not to the suit as a whole.* Thus the hearing and arguments during the interim injunction were not as exhaustive for the determination of the issues involved in the suit. In view of all these matters, it seems to me that the plea of res judicata should not prevail and that in the interest of justice there should be a full hearing of the suit itself …. (Emphasis added.)

[24] The next case that I want to refer is the decision of Justice Edgar Joseph Jr in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 where His Lordship dealt with the principle of res judicata and held that the issues raised at interlocutory stage are not res judicata and may be taken at the substantive stage. At p 93 His Lordship held:

> Firstly, it is *trite law that for a judicial decision to operate as res judicata it must be final* in the sense that it leaves nothing to be judicially determined or ascertained thereafter in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it. *The true test of res judicata in its wider sense or issue estoppel may be stated thus: has there been a final determination of the issue?* That is the crucial factor. The authorities show that *for a determination there must be a final adjudication by the court: Langmead v Maple* (1865) 18 CBNS 255. There must be a final and not an interlocutory order: *Huntley (Marchioness) v Gaskell* [1905] 2 Ch 656 (CA); *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 (CA).
>
> Secondly, it is also *trite law that the hearing of an application for an interlocutory injunction is not a trial on the merits.* This is understandable for in such proceedings there is usually no oral evidence and no opportunity for cross-examination. Nor, for that matter, would there have been the full pre-trial process of discovery and inspection of documents at that stage. The relevant criteria applicable must, of necessity, be materially different as compared to that applicable to the trial of an action since at the interlocutory stage neither party's case can be said to be 'proved'. Having said that, it is true to say, as Lord Denning pointed out in *Fellowes v Fisher* [1976] QB 122 at p 129G:
>
> > Nearly always, however, these cases do not go to trial. The parties accept the prima facie view of the court or settle the case. At any rate, in 99 cases out of 100 it goes no further. (Emphasis added.)
>
> In my opinion, *the order of Mustapha J refusing the plaintiffs the interlocutory injunction* in so far as the vegetable plot was concerned, on the ground that damages would be an adequate remedy, *was merely a prima facie view and lacked the essential element of finality since it is always open to the High Court, at the final hearing, to review the question involved and to arrive at an opposite conclusion in the light of all the evidence, both oral and documentary, should the circumstances so require*. Accordingly, *the legal effect of the refusal of the interlocutory injunction was simply, that at the interlocutory stage, based on the limited material then available, the plaintiffs were not*

> *entitled to the injunctive relief claimed. It follows, then, that in a situation such as the present, the law invests the High Court, after dismissing the application for interlocutory injunctive relief, with continuous authority thenceforth to entertain any application by the disappointed party for the like relief on proof of altered circumstances and to grant such relief if it appears to be warranted by the evidence.* (Emphasis added.)

[25] The decision of Justice Edgar Joseph in the case above was affirmed by the Supreme Court in *Perumahan Farlim (PG) Sdn Bhd*.

[26] A recent decision of the Court of Appeal in *Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor* [2008] 4 MLJ 701 is also on point. At p 715/A–D, the Court of Appeal said:

> In the instant case, the issue of locus standi was raised in the plaintiffs' application for interlocutory injunction and there was no application by the defendants to have the suits strike out on the grounds that the plaintiffs have no locus standi. *As such the function of the High Court in the instant case at that stage was to determine only whether there was a serious question on locus standi*. The learned judicial commissioner did not do so but instead she made a final determination on the issue of locus standi. In our view the learned judicial commissioner has erred when she did not follow the guidelines stated by this court in *Keet Gerald Francis Noel John*' case. *It is also our view that from the submissions made by parties on the issue of locus standi, the High Court should have held that there was a serious issue raised on locus standi and the High Court should then move to the next step of its inquiry* in accordance with the guidelines set out in *Keet Gerald Francis Noel John*'s case. (Emphasis added.)

[27] Based on the decisions above, the following principles are clearly established:

(a) at the interlocutory stage for injunctive reliefs, the court is only to decide whether the issues discloses a bona fide serious issue to be tried;

(b) at the interlocutory stage for injunctive reliefs, it is not a trial on merits and the courts are not deciding on the rights of the parties; and

(c) therefore, the issues raised during the interlocutory stage for injunctive reliefs are not res judicata for the purposes of the substantive application, as they are not final in nature which decides on the rights of the parties.

[28] I am therefore of the considered opinion that the issues of locus standi, the debenture and the MLA, which have been argued extensively during the interlocutory stage, can be raised during the cross-examination for the purposes of the substantive application. The issues are not res judicata.

[29] With regards to the issue of locus having been decided by other courts, I take note that this issue was taken as a preliminary objection. As the matter

was raised as a preliminary issue, I do not find that the same bars the issue of locus from being raised in this main application, through the cross-examination of the affidavits. In *Tetuan J & S Holdings Sdn Bhd v A Karim bin Hassan* [2000] 6 MLJ 739, Justice VT Singham said at p 748/D–F:

> In the appeal before this court, the decision or ruling made by the learned magistrate on the preliminary objection was not a final decision as it has only disposed of the preliminary objection thereby leaving scope for the parties to proceed with the hearing on the principal or main subject matter which will determine the rights of the parties in the civil action.
>
> As the defendants have raised the issue of limitation in the statement of defence, the defendants have the right to rely on that plea of limitation when the case proceeds for hearing notwithstanding the decision of the learned magistrate on the preliminary objection which is only an interlocutory order and not a final order. Consequently, it is the view of this court that the doctrine of res judicata does not apply against the defendants as the learned magistrate has not heard the evidence on the merits and the defendants are entitled to raise once again the plea of limitation as part of the defendants' case during the trial.

[30] To conclude, the application in encl (124) is hereby dismissed with no order as to costs.

Application dismissed.

Reported by Afiq Mohamad Noor